Internal Revenue Service
memorandum

CC:TL-2411-89
Br2:RLOsborne

date: FEB 16 1989

to: District Counsel, Boston, Mass. CC:BOS

from: Assistant Chief Counsel (Tax Litigation) CC:TL

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subject: [redacted]

We hereby respond to your December 27, 1988, request for technical advice.

ISSUE

Who is the appropriate party to sign waivers of the statute of limitations on tax assessment and receive statutory notices of deficiency in connection with [redacted] for [redacted] and [redacted]?

CONCLUSION

[redacted] is the proper party to sign the waivers and receive the statutory notices of deficiency for [redacted] and [redacted] as agent for the group. In addition, if practical, waivers should be signed by the other entities, including new [redacted], which were group members in the tax years under audit.

FACTS

During the tax years ending [redacted], and [redacted], a Bermuda corporation, owned [redacted] ("Old [redacted]"), a Maine corporation. Old [redacted] owned two other U.S. subsidiaries, [redacted] and [redacted]. Old [redacted] was the common U.S. parent of the group, which filed consolidated U.S. income tax returns. [redacted] was not a member of the group, because it was a foreign corporation and therefore was not an "includible corporation" within the meaning of I.R.C. § 1504(b)(3).

During the tax year ending [redacted], Old [redacted] formed a new subsidiary, [redacted], a Maine corporation. During that same year, [redacted] acquired [redacted] subsidiaries, [redacted] and [redacted] owned a subsidiary, [redacted].

On [redacted], the group was restructured. Old [redacted] merged into [redacted], which changed its name to [redacted]

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[redacted] ("new [redacted]"). Old [redacted]'s stock in [redacted] was cancelled, and [redacted] issued new stock to [redacted]. Accordingly, [redacted] owned [redacted], which owned new [redacted] (formerly [redacted]), which owned [redacted], [redacted] and [redacted]. Then [redacted]'s other subsidiary, [redacted], merged into [redacted] and went out of existence.

The consolidated returns for the group for the tax years ending [redacted] and [redacted], were signed by old [redacted]. Those years are now under audit. You have asked who should sign waivers of the statute of limitations and receive statutory notices of deficiency in connection with those returns.

ANALYSIS

Treas. Reg. § 1.1502-77(a) provides that a group's common parent shall be the group's sole agent for waiver purposes with respect to the group's consolidated return year. Accordingly, if a waiver relating to a given year is needed subsequently, after a restructuring, as a general rule the entity which was previously the common parent continues to act as agent for the signing of the waiver. This is the case even if the former common parent is no longer the common parent at the time it signs the waiver. Similarly, if the Service subsequently issues a statutory notice of deficiency, the former common parent is the appropriate party to receive the statutory notice of deficiency.

The general rule set forth above does not apply, however, where the restructuring results in the termination of the existence of the common parent. In that event, Reg. 1.1502--77(d) provides that the new agent for the group will be either (1) a member designated by the old common parent prior to the termination of its existence, or (2) a member designated by the remaining members of the group if the old common parent failed to make a designation. That regulation further provides that if neither the old common parent nor the remaining members designate a new agent, the district director must deal with the members on an individual basis.

Finally, Southern Pacific Transportation Co. v. Commissioner, 84 T.C. 375 (1985), provides another rule for reverse acquisitions under Reg. 1.1502-75(d)(3)(i). That regulation applies where one corporation acquires a second corporation, and the acquired corporation's shareholders receive stock in the acquiring corporation, so that the acquired corporation's shareholders have more than 50% of the value of the stock of the acquiring corporation immediately after the acquisition. The regulation provides that the acquired corporation's affiliated group is deemed to continue in existence, with the acquiring corporation as the new common parent. Southern Pacific involved a merger which the court treated as a reverse acquisition. In that case the old common

parent went out of existence in the merger. The Tax Court held that under the circumstances the new common parent automatically became the common parent for pre-reorganization years as well as for future years.

In the present case, both old [redacted] and [redacted] were Maine corporations. Section 905(1) of the Maine Business Corporation Act, Title 13-A, Maine Revised Statutes Annotated, provides that a merger shall be effected as of either the filing date of the articles of merger or the date specified in the articles of merger. Section 905(2)(B) provides that when the merger has been effected, the separate existence of all merging corporations except the surviving corporation shall cease. Numbered paragraph 1 of the [redacted] Plan and Agreement of Merger states that the effective date of the merger shall be [redacted]. Therefore, we conclude that under Maine law old [redacted], the old common parent, ceased to exist on [redacted].

You have indicated that the [redacted] articles of merger were filed with the Secretary of State for the state of Maine, but that no articles of dissolution were ever filed. Section 1110 of the Maine statute provides for filing of articles of dissolution. However, that provision, as well as all the other provisions dealing with dissolution, do not appear to apply to mergers. Note, for example, that under Section 1110 the articles of dissolution are to be filed only after the dissolving corporation's assets have been distributed to its shareholders. Such a distribution does not occur in a merger. Accordingly, in our view, old [redacted] merged out of existence, but did not dissolve within the meaning of Maine law. The failure to file articles of dissolution therefore appears to be of no legal significance.

Similarly, you note that the Maine statute provides for a two-year period for winding up affairs. Section 1122 of the Maine statute contains such a provision. However, by its terms it applies to corporations which dissolve, not to corporations which merge. Under section 905, as we stated above, all merger participants except the surviving corporation are deemed to go out of existence immediately on the effective date of the merger.

We understand that prior to going out of existence, old [redacted] never designated another member of the group to act as agent for the group for consolidated return purposes. Similarly, we understand that the other members of the group have never designated a substitute agent. Under a strict reading of Reg. --77(d), therefore, the agency power to bind group members would no longer exist. Upon consideration, however, we have concluded that under Southern Pacific the agency power still exists, and may be exercised by [redacted].

The court in Southern Pacific ruled that after a reverse acquisition the new common parent becomes the agent of the group for pre-acquisition years as well as for future years. As a technical matter the merger of old [redacted] into [redacted] does not meet the definition of a reverse acquisition. This is because the acquired corporation's (old [redacted]'s) shareholder ([redacted]), did not obtain stock in the acquiring corporation ([redacted]). Rather, the [redacted] transaction constituted a "downstream merger" governed by Reg. --75(d)(2). That regulation provides for the continuation of the old group where the common parent goes out of existence and its assets are transferred to another member.

Although reverse acquisitions and downstream mergers are different in form, Reg. --75(d) treats them in essentially the same manner from a tax perspective. In both cases the old group is deemed to continue, with a new common parent. The Southern Pacific decision that the new common parent becomes the agent for past years was based on the rationale that in a reverse acquisition the new common parent is simply a continuation of the old common parent. Under similar reasoning, in a downstream merger the new common parent should similarly be deemed a continuation of the old common parent. Moreover, although the Southern Pacific court treated the merger in that case as a reverse acquisition, a close reading of the facts indicates that the merger there was actually a downstream merger much like the [redacted] merger. Accordingly, we conclude that the Southern Pacific principle, that the new common parent is the common parent for past years as well as future years, should apply to this case.

Following the merger of old [redacted] into new [redacted], the new common parent of the group was [redacted]. Accordingly, under the Southern Pacific principle [redacted] is the proper agent to sign waivers and receive statutory notices of deficiency for the years prior to the merger. [redacted] should execute the reverse side of the Form 872 on its own behalf and as agent.

Although we conclude that [redacted] is the proper agent for past years, the matter is not free from doubt. Accordingly, you may wish to obtain waivers from, and send statutory notices to, each remaining group member individually, or at least those group members with substantial assets. 1/ For the [redacted] tax year, therefore, you may wish to obtain additional, individual waivers from and send statutory notices to New [redacted] (in connection with Old [redacted]'s liability), [redacted] and

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1/ In that connection, however, we agree with your view that there is no point in obtaining a waiver from old [redacted], because old [redacted] is no longer in existence.

[redacted]. For the [redacted] tax year, you may wish to obtain additional, individual waivers from and send statutory notices to New [redacted], [redacted], [redacted] and [redacted]. 2/

In your memorandum you concluded that section 905 of the Maine Busines Corporation Act imposes transferee liability on new [redacted] as the surviving corporation in the merger. We do not agree. Section 905.2.D. does provide that all property of the merging entities shall be deemed to be "transferred to" the surviving corporation. However, we interpret subsection 2.E. to impose primary liability, not secondary (i.e. transferee) liability, on surviving merger participants. That subsection states that the surviving corporation shall be "liable for all the liabilities . . . of each of the participating corporations." It further states that in prosecuting claims against terminated merger participants, the surviving entity can be "substituted" for the disappearing entity. Similar language was held to establish successorship liability in Southern Pacific Transportation Co. v. Commissioner, 84 T.C. 387, 394 (1985), and Missile Systems Corp. of Texas v. Commissioner, T.C.M. 1964-212.

Numbered section 3 of the [redacted] Plan and Agreement of Merger provides that all debts of old [redacted] "shall attach to the Surviving Corporation . . . as if such debts . . had been incurred or contracted by it." Under most circumstances, this language would be sufficient to establish contractual transferee liability at law. However, the heading of that section is "Succession," which implies that the rest of the language was intended to be simply a recitation of successorship principles under Maine statute.

In summary, there is some question as to whether new [redacted] has transferee liability in this case. Accordingly, if Exam believes that the extra year of assessment permitted for transferees under I.R.C § 6901(c)(1) could be significant, we suggest that new [redacted] execute a Transferee Agreement on Form 2045. New [redacted]'s execution of this form would permit the Service to argue that new [redacted] is bound to accept transferee liability both contractually and by estoppel. Turnbull, Inc. v. Commissioner, 373 F.2d 91, 94 (5th Cir. 1967). The waiver should be executed on Form 970.

Because we conclude that section 905 of the Maine Business Corporation Act imposes successorship liability upon new [redacted],

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2/ Your memorandum indicates that [redacted] may not have been included in the group for which the consolidated returns were filed. If a group files a consolidated return, all includable members of the group must be included in the return. Accordingly, if in fact [redacted] was not included, you should ascertain from Exam the legal basis for such exclusion.

we suggest that new [redacted] execute a Form 872 in its own behalf and "as successor to" old [redacted]. Old [redacted]'s tax liability under the consolidated return regulations was for the tax obligation of the entire old group. Reg. 1.1502-6(a). Accordingly, new [redacted]'s liability as successor is for the tax obligation of the entire old group, even though new [redacted] could not be considered the agent for the entire old group.

We note that at the time of the [redacted] merger, [redacted] also merged into [redacted]. A waiver executed by [redacted] as agent for the old group should be sufficient to extend the period of assessments against [redacted] and [redacted]. If practical, you may wish to request [redacted] to execute a Form 872 on its own behalf and as successor to [redacted]. In addition, you may wish to request [redacted] to execute a Transferee Agreement on Form 2045 and a transferee waiver on Form 970. In that connection we note that [redacted] and [redacted] were both Maine corporations, and that the Maine Business Corporation Act does not appear to provide for transferee liability in the case of mergers. Our comments with regard to the potential transferee liability of [redacted] may therefore be equally applicable to the potential transferee liability of [redacted].

MARLENE GROSS

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